

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELISSA ANN COX,

Defendant-Appellant.

UNPUBLISHED

December 30, 2003

No. 242364

Oakland Circuit Court

LC No. 01-179653-FH

Before: Schuette, P.J. and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial conviction for felonious assault, MCL 750.82(1). Defendant was sentenced to eighteen months' probation and 183 days jail. She received an enhanced sentence, pursuant to MCL 769.10, based on a previous felony conviction. We affirm.

I. FACTS

Defendant's conviction arose out of an altercation outside of a bar. Lashay Martin, the victim, testified that prior to the assault she had met defendant one time at a friend's house. Martin knew Adam Esterin through her friends. Martin was aware that defendant and Esterin had at one time been "together" and that they were not at that time. Martin stated that she and Esterin "hung out" and described them as "friends." She stated that she was at one time romantically interested in Esterin, though they were never "boyfriend and girlfriend." She occasionally spent time alone with Esterin at his house.

On April 22, 2000, Martin was at Esterin's house when defendant called fifteen to thirty times. The calls lasted until approximately 10:00 p.m. Martin stated that during the calls, defendant "threatened that she was going to come over and bash my head into the cement and kill me," and defendant also threatened Esterin. Martin did not actually speak with defendant on this occasion, but knew of the threats because Martin "was sitting right next to Adam . . . [while defendant] was going psycho and yelling out things to me and to Adam." Esterin called the police and reported the threats. After April 22, 2000, Martin did not see defendant again until the assault.

On May 18, 2000, Martin and a group of friends went to a bar. Around 2:00 a.m., she and her friends left the bar. As they were walking to their car they passed by Esterin's car. At

some point Martin, hearing someone yelling, turned around. Martin saw Esterin get out of the car and defendant get out, “still yelling.” Martin said something to Esterin and then saw defendant leaning down toward her own foot, as if to take her shoe off. Martin then felt something strike the left side of her face. She did not know what struck her, but knew that defendant had hit her. Martin grabbed her face and blacked out “for about a second” after being struck.

Martin’s friends drove her to the emergency room. Martin was in a lot of pain and received a shot for the pain at the hospital. Dr. Michael Dargay examined Martin in the emergency room. After consulting the hospital record on the stand, he stated that Martin had bruising and swelling around the boney orbit of one of her eyes, as well as a “small, very superficial laceration to the face.” He stated that after an x-ray and “CT-scan” were performed on Martin, it was determined she had four bone fractures in her face: “One involving the nose. . . the inner portion [of the eye socket] close to the nose, the remedial wall of the eye socket and then the . . . part of what we call the maxillary bone, involving the maxillary sinus.” Dargay characterized Martin’s injuries as “serious,” and “consistent with a blunt force injury.” He said it would not be unusual to see multiple fractures around the nose and eye from one blow.

Defendant testified on her own behalf that she was merely acting in self defense. She testified that Martin approached her in a confrontational manner and that she hit her because she was afraid. Defendant was convicted by a jury of felonious assault, MCL 750.82. She now appeals as of right.

II. JURY INSTRUCTIONS

Defendant claims on appeal that the trial court erred in instructing the jury that it could consider whether defendant could have safely retreated when deciding whether she used excessive force in defending herself. We disagree.

A. Standard of Review

This court reviews claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). In doing so, it examines the jury instructions as a whole, and instructions must not be extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). “Instructions that are somewhat imperfect are acceptable, as long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant.” *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362, 366 (1996), lv gtd 457 Mich 870 (1998), aff’d 460 Mich 55 (1999).

B. Analysis

The trial court’s instruction to the jury on self-defense consisted of the following paraphrase of CJI2d 7.22 and CJI2d 7.16(1): “You should consider all the evidence and use the following rules to decide whether Ms. Cox acted in lawful self-defense. [Summary of CJI2d 7.15(1) – (6).] . . . And finally, that there was no—no way open for the accused to retreat. If Ms. Cox could have safely retreated, but did not do so, you can consider that fact along with all the

other circumstances when you decide whether she went further in protecting herself than she should have.” In its entirety, CJI2d 7.16(1) reads: “A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he / she] needed to use deadly force in self-defense.”

Defendant claims that her action in self-defense, striking the victim once with a shoe, was not the use of deadly force, and therefore, a jury instruction on the duty to retreat was not proper. The validity of defendant’s claim of error depends on the characterization of the force she used to defend herself. In Michigan case law, a person is deemed to use deadly force “where the defendant’s acts are such that the natural, probable, and foreseeable consequence of said acts is death.” *People v Couch*, 436 Mich 414, 428 n 3; 461 NW2d 683 (1990), citing *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980) (defining “deadly force” in the context of self-defense). Whether death is a natural, probable and foreseeable consequence of a defendant’s acts depends on the facts of the case.

As pointed out above, this Court has stated that jury instructions “must not exclude material issues, defenses, and theories if the evidence supports them.” *Milton, supra*, 257 Mich App 475 (citing *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000)). See also *People v Riddle*, 467 Mich 116, 120 n 7; 649 NW2d 30 (2002) (“Where . . . a factual issue has been presented for the jury’s resolution concerning the circumstances under which the defendant used deadly force—as is true in the case at bar—the jury should be instructed concerning all relevant principles for which evidentiary support exists.”) Once the prosecution presented evidence from which the jury could conclude that “death” was the “natural, probable, and foreseeable consequence,” i.e., that defendant used “deadly force,” then whether defendant had a duty to retreat became a material issue in the case. In *People v Clark*, 172 Mich App 407, 418; 432 NW2d 726 (1988), this Court held that “[t]he testimony regarding defendant’s striking of [the victim] with a large iron pipe and the evidence presented concerning [the victim’s] injuries reveal acts such that the natural, probable and foreseeable consequence of such acts is death.” There is no description of the extent of the victim’s injuries in *Clark*. In the case at bar, however, the victim described extensive and serious injuries resulting from the assault. The doctor who treated the victim following the assault described the four bone fractures in the victim’s face that resulted from the blow by defendant, and characterized the victim’s injuries as “serious.” It appears from the trial judge’s ruling on the instruction at issue that he believed sufficient evidence had been presented to allow the jury to conclude that defendant used deadly force. The judge stated that “the object that was used could have been used in a deadly fashion. If it hit a temple region, if it hit the neck or something, it could have been deadly.”

The trial court’s instructions fairly presented to the jury the issues to be tried, since they gave the jury guidance regarding what to do if it found the defendant to have used deadly force. The trial court’s action in fact presented a material issue – the duty to retreat before employing deadly force in self-defense – that would have been omitted had the court presented the jury instructions as defendant requested.

The prosecution presented evidence from which the jury could have concluded that defendant used deadly force to defend herself. Consequently, the trial court did not err by instructing the jury that it could consider whether defendant could have safely retreated but did

not do so in deciding whether she honestly and reasonably believed she needed to use deadly force.

The trial court's instructions fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights.

Affirmed.

/s/ Bill Schuette

/s/ William B. Murphy

/s/ Richard A. Bandstra